

Rule 41. Search and Seizure**

(a) Scope and Definitions.

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(2) *Definitions.* The following definitions apply under this rule:

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(D) “Domestic terrorism” and “international terrorism” have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

** Text of rule based on amendments that take effect on December 1, 2002, unless Congress takes action otherwise.

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11 **(b) Authority to Issue a Warrant.** At the request of a
12 federal law enforcement officer or an attorney for the
13 government:

14 **(1)** a magistrate judge with authority in the district —
15 or if none is reasonably available, a judge of a
16 state court of record in the district — has
17 authority to issue a warrant to search for and seize
18 a person or property located within the district;

19 **(2)** a magistrate judge with authority in the district
20 has authority to issue a warrant for a person or
21 property outside the district if the person or
22 property is located within the district when the
23 warrant is issued but might move or be moved
24 outside the district before the warrant is executed;

25 **and**

26 **(3)** a magistrate judge — in an investigation of
27 domestic terrorism or international terrorism ~~(as~~

28 ~~defined in 18 U.S.C. § 2331)~~ — ~~having~~ with
29 authority in any district in which activities related
30 to the terrorism may have occurred, may issue a
31 warrant for a person or property within or outside
32 that district; and
33 **(4) a magistrate judge with authority in the district**
34 may issue a warrant to install within the district a
35 tracking device, to use a tracking device, or both;
36 the warrant may authorize use of the device to
37 track the movement of a person or property
38 located within the district, outside the district, or
39 both.

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41 **(d) Obtaining a Warrant.**

42 **(1) Probable Cause In General.** After receiving an
43 affidavit or other information, a magistrate judge
44 — or if authorized by Rule 41(b), or a judge of a

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state court of record— must issue the warrant if

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there is probable cause to search for and seize a

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person or property or to install or use a tracking

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device under Rule 41(c).

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(e) Issuing the Warrant.

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(1) *In General.* The magistrate judge or a judge of a

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state court of record must issue the warrant to an

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officer authorized to execute it.

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(2) *Contents of the Warrant.*

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(A) Warrant to Search for and Seize a Person

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or Property. Except for a tracking-device

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warrant, ~~T~~the warrant must identify the

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person or property to be searched,

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identify any person or property to be

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seized, and designate the magistrate

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judge to whom it must be returned. The

62 warrant must command the officer to:

63 ~~(A)~~(i) execute the warrant within a specified

64 time no longer than 10 days;

65 ~~(B)~~(ii) execute the warrant during the

66 daytime, unless the judge for good

67 cause expressly authorizes execution

68 at another time; and

69 ~~(C)~~(iii) return the warrant to the magistrate

70 judge designated in the warrant.

71 (B) Warrant for a Tracking Device. A

72 tracking-device warrant must identify the

73 person or property to be tracked, designate

74 the magistrate judge to whom it must be

75 returned, and specify the length of time

76 that the device may be used. The time

77 must not exceed 45 days from the date the

78 warrant was issued. The court may, for

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79 good cause, grant one or more extensions
80 of no more than 45 days each. The warrant
81 must command the officer to:
82 (i) complete any installation authorized
83 by the warrant within a specified time
84 no longer than 10 calendar days;
85 (ii) perform any installation authorized by
86 the warrant during the daytime, unless
87 the judge for good cause expressly
88 authorizes installation at another time;
89 and
90 (iii) return the warrant to the magistrate
91 judge designated in the warrant.

92 **(3) *Warrant by Telephonic or Other Means.***

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94 **(f) Executing and Returning the Warrant.**

95 **(1) Warrant to Search for and Seize a Person or**
96 **Property.**

97 ~~(1)~~(A) *Noting the Time.* The officer executing
98 the warrant must enter on ~~its face~~ it the
99 exact date and time it ~~is~~ was executed.

100 ~~(2)~~(B) *Inventory.* An officer present during the
101 execution of the warrant must prepare and
102 verify an inventory of any property seized.
103 The officer must do so in the presence of
104 another officer and the person from
105 whom, or from whose premises, the
106 property was taken. If either one is not
107 present, the officer must prepare and
108 verify the inventory in the presence of at
109 least one other credible person.

110 ~~(3)~~(C) *Receipt.* The officer executing the
111 warrant must: ~~(A)~~ give a copy of the
112 warrant and a receipt for the property
113 taken to the person from whom, or from
114 whose premises, the property was taken;
115 or ~~(B)~~ must leave a copy of the warrant
116 and receipt at the place where the officer
117 took the property.

118 ~~(4)~~(D) *Return.* The officer executing the warrant
119 must promptly return it — together with
120 the copy of the inventory — to the
121 magistrate judge designated on the
122 warrant. The judge must, on request, give
123 a copy of the inventory to the person from
124 whom, or from whose premises, the
125 property was taken and to the applicant
126 for the warrant.

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144 person who, or whose property, was
145 tracked; or by leaving a copy at the
146 person's residence or usual place of abode
147 with someone of suitable age and
148 discretion who resides at that location and
149 by mailing a copy to the person's last
150 known address. Upon request of the
151 government, the magistrate judge may, on
152 one or more occasions, for good cause
153 extend the time to serve the warrant for a
154 reasonable period.

155 **(3) Delayed Notice.** Upon request of the government,
156 a magistrate judge — or if authorized by Rule
157 41(b), a judge of a state court of record — may
158 delay any notice required by this rule if the delay
159 is authorized by statute.

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COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking-device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of “domestic terrorism” and “international terrorism,” terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of “tracking device.”

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking-device warrants. As with traditional search warrants for persons or property, tracking-device warrants may implicate law enforcement interests in multiple districts. Further, warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers’ monitoring of its location in defendant’s home raised Fourth Amendment concerns).

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install or use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge’s authority to allow installation of a tracking device includes the authority to permit maintenance and removal of the tracking device. The Committee did not intend by this amendment to expand or contract the definition of what might

constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking-device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or

monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking-device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking-device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking-device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking-device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking-device warrant to the magistrate judge designated in the warrant within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking-device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking-device warrants, on the other hand, are by their nature covert

intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking-device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.